(1) Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

GEORGE THAYER DIGGS, JR.
Petitioner
v.
COMMONWEALTH OF VIRGINIA
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

PETITION FOR WRIT OF CERTIORARI

GEORGE THAYER DIGGS, JR.
100 Marclay Rd.
Williamsburg VA 23185-2821
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July 24, 2000

50pp

QUESTIONS PRESENTED

1. **Does punitive pretrial incarceration, arising from a defendant's belated invocation of his right to a jury trial, *per se*, or as here applied, constitute harassment or coercion sufficient to justify permission to withdraw his "*Alford*" plea?**

2. **Does Virginia Supreme Court Rule 3A:8(b) unconstitutionally deny due process by failing to require trial court examination, in accepting an "*Alford*" plea, as to whether a defendant's primary motivation is immediate release from pretrial incarceration?**

3. **Does failure of Petitioner to seek withdrawal of his "*Alford*" plea within 21 days of being sentenced, notwithstanding the Trial Court's open court advice that he had "a right of appeal", preclude consideration of his timely appeal?**

LIST OF PARTIES

Petitioner **George Thayer Diggs, Jr,** is a resident of the Commonwealth of Virginia

The Respondent **Commonwealth of Virginia**, is one of the United States.

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Petitioner respectfully prays that a writ of certiorari issue to review the refusal to accept petition for appeal on April 25, 2000 by the Supreme Court of the Commonwealth of Virginia.

OPINIONS BELOW

The Refusal to Accept Appeal by the Virginia Supreme Court appears as Appendix A hereto. The Opinion and the Denial of Appeal by the Virginia Court of Appeals appear as Appendices B and C respectively.

JURISDICTION

The judgment of the Virginia Supreme Court was entered on April 25, 2000. This petition for certiorari is being filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Virginia Code § 18.2-57, Assault, Misdemeanor
Virginia Code §18.2-121 Trespass, Misdemeanor
Virginia Code §19.2-296. Withdrawal of plea of guilty (fn 9)
Virginia Supreme Court Rules 5A:18 (fn 10) and 3A:8

STATEMENT OF THE CASE

On May 27, 1998, tow truck operator John Burk, and his girlfriend Martha Herndon, trespassed upon the private residential property of Petitioner George Thayer Diggs in James City County, Virginia, and wrongfully attempted to repossess a vehicle owned by Petitioner, for which he had fully paid months earlier. When Burk and Herndon refused to desist from towing Petitioner's vehicle, and refused to await arrival of police to resolve the problem, Petitioner disabled the tow truck by firing accurately, flattening the tow truck's outside rear right hand tire with a pistol.

Petitioner was arrested, charged with a felony and two misdemeanors, and released on bail. After a hearing in the General District Court, where he was convicted on some of the charges, Petitioner appealed his convictions to the Circuit

Court on September 17, 1998. There was to be a **trial de *novo,*** entitling Petitioner to a renewed presumption of innocence. There were several continuances, arising from Petitioner's difficulties in hiring counsel, and his change of counsel. Discovery and disclosure were conducted.

At a March 23, 1999 trial-scheduling conference, Petitioner invoked his right to Trial by Jury. Retired Judge Oast, sitting pro-tem, was apparently angered by Petitioner's demand for jury trial, and without making any findings as to changed circumstances, as to any newly discovered flight risk or danger of Petitioner to society, punitively revoked Petitioner's bail, indicating that Petitioner would remain incarcerated until a jury trial date nearly three months later. Subsequently, Petitioner's counsel sought, and received, leave to withdraw and be replaced by another, appointed, defense counsel.

Petitioner had been at liberty on bail for nearly nine months. He was in full compliance with the terms of his pre-trial release, at the time it was revoked.

There was no official court reporter in Judge Oast's courtroom during the scheduling conference and revocation of bail. But a newspaper reporter, Paul Aron, was personally present, and reported the unusual punitive proceedings in an article published the next day, 3/24/99 in the general-circulation ***Virginia Gazette***, on page 2A, (Appendix F hereto). The article included an interview of Judge Oast regarding the potential chilling effect of his action upon all who wished to invoke a Constitutional right to trial by jury.

After a day of revoked-bail incarceration, the shocked and despondent Petitioner appeared together with his newly appointed counsel before a different judge, Hon. J. Warren Stephens, to seek release on bail. Judge Stephens declined to consider setting bail, stating that he preferred to allow Judge Oast to hear the bail matter, four days later. In view of Oast' already having inflicted the constitutionally offensive, punitive, pretrial incarceration the day before, Petitioner's alarm and despair were heightened.

A few hours later, the desperate Petitioner, who only the day before had believed his defense winnable in a jury trial, entered into an "***Alford***" plea bargain[1] calling for suspended sentence of reduced charges. Petitioner viewed the involuntary guilty plea as his only chance to avoid nearly three months of punitive pre-trial incarceration. Petitioner believed that once released, he would be able to challenge the outcome of his wrongful, incarceration-forced, plea bargain, because of the unconstitutional manner in which pressure was applied to thwart his jury trial demand.

Within hours of entry into the plea bargain, Petitioner and his counsel were again before Judge Stephens, seeking acceptance, sentencing and immediate release of Petitioner from pre-trial incarceration. The judge required the hand-written plea agreement first be typed, causing further delay, and consequent further mental pressure upon Petitioner. When brought finally back into court, that same day, with the typewritten plea bargain, the desperate Petitioner was willing to say anything required to be let out of jail that day.

Judge Stephens attempted to query Petitioner along the lines of a form, "suggested" for ***Alford*** pleas by the Rules of the Supreme Court of Virginia.[2]

Petitioner attempted to answer so as to please, or at least not alarm, Judge Stephens.[3] In so doing, Petitioner limited nearly all his responses to "Yes, sir." The form of questions failed to inquire about motives for plea bargaining other than a balancing between danger of going to trial and waiving a defendant's rights to trial. Thus, the formal questioning failed to reveal the real reason for the bargain: a well founded fear that an angry, out-of-control Judge Oast would punitively

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[1] ***North Carolina v. Alford***, 400 U.S. 25, 91 S.Ct 160, 27 L Ed. 2d 162 (1970)

[2] *FORM 6, Appendix, Part 3A, Rules of the Supreme Court of Virginia* ***"Suggested Questions to Be Put by the Court to an Accused Who Has Pleaded Guilty (Rule 3A:8)"***. See APPENDIX D hereto.

[3] See complete transcript of the 3/24/99 proceedings, APPENDIX E hereto.

keep Petitioner in jail through June 1999, or perhaps, even longer, through further jury trial continuances.

Petitioner was led to believe, by his inadequate new counsel, and by Judge Stephens, that once released from the oppressive pre-trial incarceration, he might remedy, by appellate reversal, the damage to his viable defense done by the pressured plea bargain. At the conclusion of the 3/24/99 proceedings, the Judge told Petitioner how to procedurally initiate an appeal.[4] The initial question as to Petitioner's understanding regarding appeal[5] did not mention "an appeal". Subsequently, the Judge again brought up limitation of appeals to "jurisdictional defects", failing to explain what "jurisdiction" meant. The mystified Petitioner agreed with the Judge's opinion that there "was no jurisdictional defect".[6]

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[4] **"THE COURT**: ..... Sir, you have a right to petition for an appeal with the Virginia Court of Appeals. If you desire to do so you should consult with your attorney without delay. The first step in any such appeal procedure is the filing by you of a notice of appeal with the clerk of this court within thirty days." . (See Transcript, APPENDIX E)

[5] **"THE COURT**: By pleading guilty you also waive or give up all but jurisdictional defense, do you understand that?
"THE DEFENDANT: Yes. (See Transcript, APPENDIX E)

[6] ."**THE COURT**: Do you understand that when you plead guilty you waive any right to appeal or petition for any appeal from the decisions of this Court with the exception of the existence in these proceedings of any jurisdictional defects?
"THE DEFENDANT: Yes, sir.
"THE COURT: Do you understand that in this Court's opinion there are no jurisdictional defects in the proceeding?
"THE DEFENDANT: I'm sorry?
"THE COURT: Do you understand that there are no jurisdictional defects in the proceedings?
"THE DEFENDANT: Yes, sir.
"THE COURT: You understand then for all practical purposes when you voluntarily and intelligently and freely plead guilty, you waive any right to appeal or petition for appeal?
"THE DEFENDANT: Yes, sir". (See Transcript, APPENDIX E)

At all times during the 3/24/99 proceedings, Petitioner's overly compliant answers were focused upon not being returned to a jail cell. He was, indeed, released that day by virtue of his concessions in the plea bargain. Within 21 days of the 6/1/99 formal entry of judgment, Petitioner filed his timely notice of appeal.

Unfortunately, Petitioner's newly-appointed counsel was unskilled, had never conducted a jury trial before, and was apparently unable or unwilling to clearly or forcefully advocate in the appeal,, the outrageous, ***in-terrorem*** constitutional infringement by Judge Oast as the real basis why the plea bargain was not voluntary. Such likely eyebrow-raising appellate claim should have been supported by judicial notice of a newspaper article,[7] and inquiry into the comment of Judge Stephens, of record,[8] regarding the wrongful jury-trial-request basis for Judge Oast's revocation of bail the previous day.

Counsel's mild-mannered Appeal Brief, and its repetition in seeking Virginia Supreme Court review, was

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[7] ***The Virginia Gazette, Williamsburg VA, 3/24/99, Page 2A***
"Businessman jailed over trial delays By Paul Aron
"WILLIAMSBURG - A local businessman was thrown in jail Tuesday morning after a judge apparently decided that his request for a jury trial was part of a pattern of delay.....

"Retired Judge William Oast was clearly annoyed by Diggs' surprise request for a jury trial. Diggs has a right to a jury trial, but Oast revoked his bond and told the defendant he would remain in jail until the trial.

"Questioned afterward about whether his ruling would discourage others from invoking their constitutional right to a trial by jury, Oast referred a reporter to the case file. That included a series of delays, as Diggs changed from one attorney to another....." (See APPENDIX F)

[8] "**MS. BOLASH:** The case, Your Honor, is Mr. Diggs' case, and he [Judge Oast] did not try the case. He just remanded Mr. Diggs to jail on no bond.
"**THE COURT:** That's right. Mr. Diggs is the man who wanted a jury.
"**MR. BELL:** That's correct, Your Honor. Mr. Diggs asks the Court to accept his guilty plea and there is a plea agreement." (See APPENDIX E)

inadequate to raise the constitutional issues raised herein. They are not, however, precluded at this stage, because unconstitutionality goes to jurisdictional issues and may therefore be freshly raised at any time.

The Virginia Court of Appeals affirmed the Trial Court's acceptance of the plea bargain, and the sentence, invoking without directly citing it, a twenty-one day post-conviction permissive provision for seeking withdrawal of a plea.[9] .

The Court of Appeals further based its affirmance on Petitioner's failure to timely object to the incarceration-coerced plea bargain at trial.[10] In view of the constitutionally suspect punitive pretrial detention, a different, competent appellate counsel would have presented and vigorously argued Petitioner's fear of prolonged pretrial incarceration, as grounds for not objecting prior to his release from jail.

The Court of Appeals therefore refused to invoke the clause, "***...except for good cause shown or to enable the Court of Appeals to attain the ends of Justice.*** " ***Virginia Supreme Court Rule 5A:18***"[11]. That refusal arose from the

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[9] ***Virginia Code § 19.2-296.*** **Withdrawal of plea of guilty.**
A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of a sentence is suspended; but to correct manifest injustice, ***the court within twenty-one days after entry of a final order may set aside the judgment of conviction and permit the defendant to withdraw his plea.*** (Emphasis Supplied)

[10] "No ruling of the trial court ... will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of Justice." ***Virginia Supreme Court Rule 5A:18***

[11] See ***Rule 5A:18***, id., fully set forth in the footnote immediately above.

inadequate assistance of Petitioner's newly assigned counsel,[12] post-sentencing and on appeal.

Upon affirmance by the Court of Appeals, Petitioner's appointed new counsel submitted to the Virginia Supreme Court, a virtually verbatim repetition of his previous Appellate brief, completely omitting reference to, or argument against, any of the cases, reasons or grounds stated by the Appeals Court in support of its affirmance.

The Virginia Supreme Court then refused the Appeal, without comment. (APPENDIX A).

This Petition for Certiorari seeks, on the basis of one or more of the following assertions, reversal of the Virginia Court of Appeals affirmance, and remand to the Trial Court for withdrawal of the plea bargain, and such further proceedings as would follow withdrawal.

1. Punitive pretrial incarceration, arising from a defendant's belated invocation of his right to a jury trial, *per se*, or as here applied, constitutes harassment or coercion sufficient to justify permission to withdraw his "***Alford***" plea.
2. Virginia Supreme Court Rule 3A:8(b) unconstitutionally denies due process by failing to require trial court examination, in accepting an "***Alford***" plea, as to whether a defendant's primary motivation is immediate release from pretrial incarceration.
3. Failure of Petitioner to seek withdrawal of his "***Alford***" plea within 21 days of being sentenced, notwithstanding the Trial Court's open court advice that he had "a right of appeal", does not preclude consideration of his timely appeal.

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[12] A potential conflict of interest may be noted from the record, in that the Petitioner's new counsel was personally appointed by Judge Oast immediately after Petitioner's prior counsel moved to withdraw, minutes after the 3/23/99 bail revocation. Having just been appointed by Judge Oast, the new attorney may have found it difficult, post-sentencing or on appeal, to attack Judge Oast's arguably unconstitutional, *in terrorem* bail revocation as a basis for withdrawing the plea agreement.

REASONS FOR GRANTING THE WRIT

Plea bargaining is often a shady business, in which prosecutors, in the interests of reducing their and the Court's caseload make backroom deals which may or may not serve the interests of justice. While there are often arguable benefits to a defendant, those benefits are sometimes only a reduction from a patently excessive and overreaching ***in-terrorem*** criminal charge, down to a lesser and sometimes more accurate description of the crime. Some innocent persons are so burdened and overawed by the power of the state to impose mandatory sentencing, and intolerably severe penalties, that they are advised by defense counsel, especially overloaded public defenders, to plead guilty to a crime the defendant truly believes he did not commit, or believes to which he has a viable defense..

The United States Supreme Court has perhaps reluctantly given its blessing to plea bargaining, but has mandated careful trial court examination of the defendant's motives and voluntariness in waiving his criminal defense rights, especially where a plea bargain means the difference in possibility of a death sentence. Such careful examination, arising from ***North Carolina v. Alford***[13] and its progeny, focuses upon whether the defendant rationally understood at the time of plea entry, the balance between a reduction in severity of the charge and penalty, versus the possibility of being exonerated completely at trial.

Generally unspoken and unexamined, however, is the ***de facto*** effect upon plea-bargain voluntariness, of pre-trial incarceration. A defendant who is able to remain at liberty, on bail or on his own recognizance, can freely consider the benefits and detriments of a plea bargain from the viewpoint of his resultant punishment. But, depending upon the circumstances and expectation of prolonged pretrial jailing,

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[13] ***North Carolina v. Alford***, id.,400 U.S. 25, 91 S.Ct 160, 27 L Ed. 2d 162 (1970)

the incarcerated defendant, especially one who is not a flight, recidivism, nor public safety risk, is necessarily influenced in plea bargaining, by his often mind-altering short-term need to be set free. Although a trial court, in examining a defendant for voluntariness, understanding and rationality may ask if the defendant's mental state is affected by current ingestion of drugs or medications, or whether he has been explicitly threatened during plea negotiations, the obvious pressure of continued pretrial incarceration is usually ignored.

The circumstances of the present case are even more onerous than those of most incarcerated plea-bargaining defendants who later seek to withdraw their pleas. In this case, the defendant was free on bail from shortly after his arrest, up to the moment, nine months later, when he lawfully exercised his constitutional right to a jury trial, and had his bail immediately revoked, arguably either as judicial punishment for the exercise, or as judicial persuasion to abandon, that right. It should be reasonably inferred that a judge who revokes bail on such a constitution-infringing basis, without any other change of circumstances, no increased danger to the public, nor misconduct by the defendant, has a primary goal of terrorizing such defendant into waiving his newly asserted right to jury trial.

Permission to withdraw a plea resulting from a form of coercion or pressure not contemplated in ***Alford*** should therefore be based on standards less stringent than, or at least different from, those in ***Alford*** and its progeny.

I.

Punitive pretrial incarceration, arising from a defendant's belated invocation of his right to a jury trial, *per se,* or as here applied, constitutes harassment or coercion sufficient to justify permission to withdraw his "*Alford*" plea

In ***Bitter v. United States***[14], the U.S. Supreme Court reversed a conviction in which the defendant's defense was deemed unduly burdened by a sudden bail revocation. As in the present case, the trial judge revoked the long-standing bail by claiming to base the revocation on defendant's "delay" of proceedings, in particular, being 37 minutes tardy in returning from a court recess.

The prospective "delay" which angered Judge Oast herein, related solely to fresh invocation of a constitutional

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[14] "A trial judge indisputably has broad powers to ensure the orderly and expeditious progress of a trial. For this purpose, he has the power to revoke bail and to remit the defendant to custody. But this power must be exercised with circumspection. It may be invoked only when and to the extent justified by danger which the defendant's conduct presents or by danger of significant interference with the progress or order of the trial.[fn*] ***See Fernandez v. United States***, 81 S. Ct. 642 (1961) (memorandum of MR. JUSTICE HARLAN in chambers); ***Carbo v. United States,*** 288 F.2d 282 (C. A. 9th Cir. 1961); ***Christoffel v. United States***, 89 U.S. App. D.C. 341, 196 F.2d 560 (1951).

" The record in this case shows only a single, brief incident of tardiness, resulting in commitment of the defendant to custody for the balance of the trial in a jail 40 miles distant from the courtroom. In these circumstances, the trial judge's order of commitment, made without hearing or statement of reasons, had the appearance and effect of punishment rather than of an order designed solely to facilitate the trial. Punishment may not be so inflicted. Cf. Rule 42 of Fed. Rules Crim. Proc. (governing the contempt power). We therefore hold that the order was unjustified and that it constituted an unwarranted burden upon defendant and his counsel in the conduct of the case.

" Accordingly, we grant certiorari and reverse the judgment. "
Bitter v. United States, 389 U.S. 15 (1967)

right to trial by jury. Whether the abruptly initiated pretrial incarceration was meant by Judge Oast to be the constitutionally impermissible "punishment" of a person deemed innocent until found guilty[15], or whether it was meant by Judge Oast to pressure Petitioner into abandoning his quest for trial by jury, there was an obvious, predictable, perception by Petitioner of such pressure.

Prosecutors are, unfortunately, allowed, under US Supreme Court precedent, to apply their own brand of pressure in plea bargaining, such as threat of "raising the ante" with elevated charges.[16] The prosecutor is an advocate, and is not required to be unbiased. But the application of such pressure (to plead guilty rather than await trial while incarcerated) by a presumably neutral judge should be deemed impermissible. None of the legitimate reasons for denial of bail and imposition of pre-trial detention, such as public safety, avoidance of likely flight, or prevention of repeated offense, apply to Petitioner herein.

II.

Virginia Supreme Court Rule 3A:8(b) unconstitutionally denies due process by failing to require trial court examination, in accepting an "*Alford*" plea, as to whether a defendant's primary motivation is immediate release from pretrial incarceration.

Alford[17] and its progeny resulted in the Virginia Supreme Court's "suggested" ***Rule 3A:8(b)*** form of questions[18], propounded by Judge Stephens to Petitioner[19].

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[15] See ***Bell v. Wolfish***, 441 U.S. 520 (1979) dealing with oppressive, overcrowded jail conditions endured by defendants awaiting trial, claimed to amount to punishment of persons deemed innocent until proven guilty, but in which their reasons for pretrial incarceration legitimately arose from security and risk-of-flight considerations.

[16] ***United States v. Goodwin***, 457 U.S. 368 (1982)

[17] ***North Carolina v. Alford***, id.,400 U.S. 25, 91 S.Ct 160, 27 L Ed. 2d 162 (1970)

[18] See APPENDIX D

[19] See APPENDIX E

The form, and Judge Stephens' questions, ostensibly asked in order to preserve due process in determining voluntariness, are devoid of inquiry into the non-sentencing-related factor of pre-trial incarceration.

The pro-forma questions put words into Petitioner's mouth to satisfy Alford criteria.[20]

Petitioner, whose mind was desperately fixated upon immediate release from jail, was able to affirmatively answer that the Prosecutor and persons connected with his arrest had not pressured him to enter the plea agreement.[21] But someone ***had*** pressured him: Judge Oast, who was not encompassed in the inadequately framed questions. Petitioner dared not verbalize that improper application of pressure, for fear that he would be sent back to jail that day.

Surely, Petitioner is not the only Virginia defendant whose waiver of rights to trial was precipitated by improper or tactical pre-trial incarceration. The existing plea examination rule and its "suggested" list of questions do not reveal existence of such pressure or persuasion, and therefore should be found unconstitutionally void as denial of due process. Persons whose convictions arose from plea bargains so pressured or persuaded, should be permitted to withdraw those pleas and reopen the defenses to which they would have been entitled absent the plea bargain.

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[20] "**THE COURT**: Thank you, ma'am. Would you please stand. You have heard the evidence summarized by the Commonwealth. Are you pleading guilty because you've heard that evidence summarized and you believe upon presentation of the evidence the Commonwealth can prove your guilt beyond a reasonable doubt and you do not wish to take that risk, is that correct?
"**THE DEFENDANT**: Yes, sir." Transcript, APPENDIX E

[21] "**THE COURT**: Has anyone connected with your arrest or prosecution, such as the police or the attorney for the Commonwealth or any other person, in any manner, threatened you, coerced you, forced you, pressured you, or tricked you to enter either of these pleas of guilt?
"**THE DEFENDANT**: No, sir." Transcript, APPENDIX E

III.

Failure of Petitioner to seek withdrawal of his "*Alford*" plea within 21 days of being sentenced, notwithstanding the Trial Court's open court advice that he had "a right of appeal", does not preclude consideration of his timely appeal.

Virginia statute provides for the permissive, but extraordinary, seeking of leave to withdraw a plea bargain for up to twenty-one days after entry of a final order.[22] The Virginia Court of Appeals deemed Petitioner's appellate arguments precluded, in part, because he made no attempt to move the trial court for withdrawal of the plea bargain, but instead, within the same 21 day time period, filed a notice of appeal.[23]

Petitioner had been led by the Court, and his newly appointed counsel, to believe that he retained his right of appeal, even though he was advised that such right was limited to "jurisdictional defects". Such a belief, whether mistaken or not, admittedly does not create appellate jurisdiction where such jurisdiction does not otherwise exist. However, it is probative of Petitioner's state of mind, in making agreeable but incomplete answers,[24] upon examination for voluntariness, which he believed necessary

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[22] ***Virginia Code § 19.2-296. Withdrawal of plea of guilty.***
A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of a sentence is suspended; but to correct manifest injustice, the court within twenty-one days after entry of a final order may set aside the judgment of conviction and permit the defendant to withdraw his plea.

[23] "On April 1, 1999, the trial court entered the final order. Appellant never raised the issues on appeal in the trial court or moved the trial court to allow him to withdraw his pleas. Instead, on April 21, 1999, appellant filed a notice of appeal to this Court. Accordingly, Rule 5A:18 precludes consideration of appellant's argument on appeal." Appeal Court ruling, APPENDIX B.

[24] *See* generally, Transcript, APPENDIX E

to being speedily released from arguably wrongful pre-trial incarceration.

As argued herein, the primary fruit of Judge Oast' unconstitutionally burdensome bail revocation, based upon assertion of the Sixth Amendment right to trial by jury, deprived or limited the Trial Court's jurisdiction, under ***Alford*** and its progeny, to render a judgment arising from the resultant involuntary plea agreement. That constitutional element, and the intertwined jurisdictional defect, rendered the plea bargain appealable in Virginia. Lack of jurisdiction may be raised at any time, including this Supreme Court Petition for Certiorari, because it goes to the Trial Court's fundamental power to enter judgment and impose a criminal sentence.

CONCLUSION

Petitioner urges that a "fruit of the poisonous tree" approach is no less valid in protecting Sixth Amendment rights than the Supreme Court has deemed applicable to the Fourth[25] and Fifth[26] Amendments. Otherwise groundless revocation of bail by a judge angered by lawful invocation of the right to jury trial, for the ***de facto*** purpose of deterring exercise of that right, is as reprehensible as obtaining evidence by unlawful search and seizure, or using unconstitutional police station interrogation tactics to force a confession. As a matter of public policy, the United States Supreme Court should consider deterrence of wrongful pre-trial incarceration and denial of bail aimed at securing an involuntary guilty plea, primarily influenced by a defendant's desperate need to be immediately released.

The Supreme Court should grant Certiorari and thereafter remand the matter for further proceedings.

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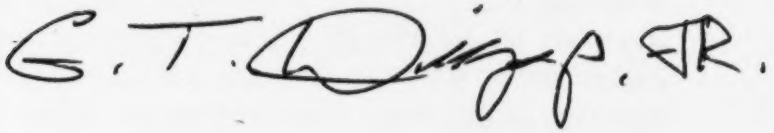
[25] ***Mapp v. Ohio***, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, 84 ALR2d 933 (1961)

[26] ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); ***Dickerson v. United States*** ___ U.S. ___, (June 26, 2000), No. 99-5525, 166 F.3d 667, reversed

Respectfully Submitted on July 24, 2000



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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 25th day of April, 2000

George Thayer Diggs, Jr., **Appellant**
against Record No 000114
Court of Appeals No. 0941-99-1
Commonwealth of Virginia, **Appellee.**

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of the City of Williamsburg and County of James City shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the courts below.

A Copy, Teste:
David B. Beach, Clerk
By: Jennifer G. Earl

Costs due the Commonwealth
by appellant in Supreme Court of Virginia
Attorney's fee $200.00 plus costs and expenses
Teste: David B. Beach, Clerk by Jennifer G Earl
Entered this 19th day of May 2000, Betsy W. Woolridge, Clerk by Julie Murray, DC

APPENDIX B

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday the 17th day of August, 1999.

George Thayler Diggs, Jr., Sometimes Known as
George Thayer Diggs, Jr., **Appellant**
against Record No 0941-99-1
Circuit Court Nos. 10259-01 and 10259-02
Commonwealth of Virginia, **Appellee.**

From the Circuit Court of the City of Williamsburg and County of James City
Before Chief Judge Fitzpatrick

This petition for appeal has been reviewed pursuant to Code § 17.1-407(c), recodifying Code § 17.116.05:2(c), and is denied for the following reason:

Appellant contends "the [trial] court erred in accepting the [plea] agreement without determining whether it was freely and voluntarily given." He further claims that the "court erred in not considering that [appellant] was under duress" and subject to "undue influence" affecting his ability "to enter an intelligent and voluntary plea."

"No ruling of the trial court ... will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice." Rule 5A:18. "Under Rule 5A:18, we do not consider trial court error as a basis for reversal where no timely objection was made except in extraordinary situations to attain the ends of justice." ***Redman v. Commonwealth***, 25 Va. App.215, 220, 487 S.E. 2d 269, 272 (1997).

"The ends of justice exception is narrow and is to be used sparingly ..." "[I]t is a rare case in which, rather than invoke Rule [5A:18], we rely upon the exception and consider an assignment of error not preserved at trial ...." In order to avail oneself of the exception, a defendant must affirmatively show that a miscarriage has occurred, not that a miscarriage might have occurred. The trial error must be "clear, substantial and material." ***Id.*** at 220-21, 487 S.E. 2d at 272 (citations omitted)

A voluntary and intelligent guilty plea by an accused is "`a waiver of all defenses other than those jurisdictional .... Where a conviction is rendered upon such a plea and the punishment fixed by law is in fact imposed in a proceeding free of jurisdictional defect, there is nothing to appeal.'" ***Dowell v. Commonwealth***, 12 Va. App. 1145, 1148, 408 S.E. 2d 263, 265 (1991) (quoting ***Savino v. Commonwealth***, 239 Va. 534, 539, 391 S.E. 2d 276, 278 (1990), aff'd on reh'g en banc, 14 Va. App. 58, 414 S.E. 2d 440 (1992).

"[T]he record must affirmatively show that a guilty plea is entered freely and intelligently." ***Mason v. Commonwealth***, 14 Va. App. 609, 612, 419 S.E. 2d 856, 858 (1992). However, "the truth and accuracy of representations made by an accused as to ... the voluntariness of his guilty plea will be considered conclusively established by the trial proceedings, unless the [accused] offers a valid reason why he [or she] should be permitted to controvert his [or her] prior statements." ***Anderson v. Warden***, 222 Va. 511, 516, 281 S.E. 2d 885, 888 (1981).

Appellant pled guilty[1] on March 24, 1999 in accordance with a plea agreement signed by the parties and tendered to the trial court. Following an extended and detailed colloquy between appellant and the trial judge and pursuant to the agreement, the trial judge found appellant guilty of two misdemeanors, imposed the agreed upon sentence for each and ***nolle prosequied*** the felony charge. On April 1, 1999, the trial court entered the final order. Appellant never raised the issues on appeal in the trial court or moved the trial court to allow him to withdraw his pleas. Instead, on April 21, 1999, appellant filed a notice of appeal to this Court. Accordingly, Rule 5A:18 precludes consideration of appellant's argument on appeal. See ***Allen v. Commonwealth***, 27 Va. App. 726, 730, 501 S.E. 2d 441, 442-43 (1998).

Rule 3A:8(b) provides that "[a] circuit court shall not accept a plea of guilty ... without first determining that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea." Rule 3A:8(c) describes the procedure for plea agreements. The trial judge engaged in a lengthy and detailed discussion with appellant to insure that his pleas were being entered knowingly, voluntarily and intelligently. The trial judge also carefully reviewed the plea agreement with the parties to insure that it encompassed all of the matters agreed upon. The record reflects that appellant was fifty-seven years old at the time and had sixteen years of education. He responded appropriately to each question and explanation presented by the trial judge. He indicated that he understood each right he was waiving by pleading guilty and that he understood the

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[1] Appellant orally entered "Alford plea[s] of guilty." An ***Alford*** or ***nolo contendere*** plea is "equivalent to a plea of guilty" for purposes of determining whether the plea was entered voluntarily, intelligently and knowingly. ***Allen v. Commonwealth***, 27 Va. App. 726, 929 n.1, 501 S.E. 2d 441, 443 n.1 (1998); ***see also Clauson v. Commonwealth***, 29 Va. App. 282, 294, 511 S.E. 2d 449, 455 (1999) (holding that plea of nolo contendere, like a guilty plea, constitutes a waiver of right to appeal all non-jurisdictional issues).

charges against him and what the Commonwealth had to prove to convict him. Appellant stated he was pleading guilty because he did not want to take the risk of being found guilty based on the Commonwealth's evidence. He acknowledged that he discussed the plea agreement and the charges with his attorney before making his decisions, and he indicated that no one pressured, coerced, or forced him to enter his pleas. The trial judge thoroughly explained the procedures contained in Rule 3A:8, and he put forth all of the suggested queries contained in Form 6 in the Appendix to Part 3A of the Rules of the Supreme Court of Virginia.

Appellant alleges no jurisdictional defect, nor does he contend that the Commonwealth or trial court failed to honor the terms of the agreement. Moreover, his clear and responsive answers to the trial judge's detailed questioning demonstrate that his pleas were answered knowingly, voluntarily and intelligently. In contrast, nothing in the record suggests that appellant acted unusual or that his mental state was adversely affected at the time. Accordingly, the record does not reflect any reason to invoke the good cause or ends of justice exceptions to Rule 5A:18.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D), recodifying Code § 17.116.05:2(D), and Code § 5A:15(a). If appellant files a demand for consideration by a three-judge panel, the demand may include a statement, not to exceed one typewritten page, identifying how this order is in error.

The trial court shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

Costs due the Commonwealth by appellant in Court of Appeals of Virginia: Attorney's fee $400.00 plus costs and expenses.

A Copy, Teste: Cynthia L. McCoy, Clerk
By: Marky K.P. Ring, Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday the 22nd day of December, 1999.

George Thayler Diggs, Jr., s/k/a
George Thayer Diggs, Jr., **Appellant**
against Record No 0941-99-1
Circuit Court Nos. 10259-01 and 10259-02
Commonwealth of Virginia, **Appellee.**

From the Circuit Court of the City of Williamsburg and County of James City

Before Judge Bray, Senior Judge Hodges and Retired Judge Olitsky[1]

For the reason previously stated in the order entered by this court on August 17, 1999 the petition for appeal in this case hereby is denied.

It is ordered that the trial court allow court-appointed counsel for the appellant an additional fee of $100 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses. In addition to the costs incurred in this Court's August 17,1999 order, the Commonwealth shall recover of the appellant the costs reflected in this order.

This order shall be certified to the trial court.

Additional costs due the Commonwealth by appellant in Court of Appeals of Virginia: Attorney's fee $100.00 plus costs and expenses. A Copy,Teste: Cynthia L. McCoy, Clerk By: Marky K.P. Ring, Deputy Clerk

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[1] Retired Judge Norman Olitsky took part in the consideration of this case by designation pursuant to Code § 17.1-400(D), recodifying Code § 17.1-116.01

FORM 6, Appendix, Part 3A
Rules of the Supreme Court of Virginia

Suggested Questions to Be Put by the Court to an Accused Who Has Pleaded Guilty (Rule 3A:8).

Before accepting your plea of guilty, I will ask you certain questions. If you do not understand any question, please ask me to explain it to you.

1. (a) What is your full name? _____
(b) What is your date of birth? _____
(c) What was the last grade in school which you completed? _____
(d) What other education have you received? _____

2. Are you the person charged in the (indictment) (presentment) (information) (warrant) with commission of the offense(s) of _____

3. Do you fully understand the charge(s) against you? Have you discussed the charge(s) and (its) (their) elements with your lawyer and do you understand what the Commonwealth must prove before you may be found guilty of (this) (these) charge(s)? _____

4. Have you had enough time to discuss with your lawyer any possible defenses which you may have to (this) (these) charge(s)? _____

5. Have you discussed with your lawyer whether you should plead not guilty or guilty? _____

6. After the discussion, did you decide for yourself that you should plead guilty? _____

7. Are you entering the plea of guilty freely and voluntarily? _____

8. Are you entering the plea of guilty because you are, in fact, guilty of the crime(s) charged? _____ [If the defendant answers 'No,'

(a) Have the Commonwealth summarize the evidence on the record.
(b) Ask the defendant, 'Are you pleading guilty because this is the Commonwealth's evidence, and you do not wish to take the risk that you will be found guilty beyond a reasonable doubt?'
(c) If the defendant answers 'Yes,' the court may, but need not, accept the plea; if the court accepts the plea, the court should note that there is substantial evidence against the defendant. Otherwise the court should not accept the plea. (See North Carolina v. Alford, 400 U.S. 25 (1970).]
9. Do you understand that, by pleading guilty, you are NOT entitled to a trial by jury? _____
10. Do you understand that, by pleading guilty, you waive your right not to incriminate yourself? _____
11. Do you understand that, by pleading guilty, you waive your right to confront and cross-examine your accusers? ___
12. Do you understand that, by pleading guilty, you waive your right to defend yourself?_____
13. [If the accused is in prison, on parole, or probation,] Do you understand that conviction may (affect your right to parole) (cause revocation of your parole/probation?)
14. [If the crime involves possession~istribution of drugs,] Have you discussed with your lawyer whether the defense of accommodation may apply in this case?
15. [If the accused may be sentenced under the habitual offender statute,] Have you discussed with your lawyer the possibility that there may be mitigating circumstances that permit this court not to impose the mandatory sentence?
16. Has anyone connected with your arrest and prosecution, such as the police or the Commonwealth's attorney, or any other person, in any manner threatened you or forced you to enter this plea of guilty? Have they made any promises concerning your plea of guilty?
17. Do you understand that the maximum punishment for this crime is _____years imprisonment and $_____ fine plus all court costs? (If a guilty plea involves more than

one offense, substitute the following: Do you understand that if you are sentenced consecutively, the maximum punishment for these crimes is _____ fine and $_____ plus all court costs? [If the crime has a mandatory punishment, also question accused on his understanding of the mandatory punishment.]

18. Are you entirely satisfied with the service (of the lawyer who was appointed to represent you) (of the lawyer representing you) in this matter? ____

19. Do you understand that, by pleading guilty, you may waive any right to appeal the decision of this court? [The judge may, but need not, inform the defendant that a guilty plea does not waive the right to appeal lack of jurisdiction or imposition of an impermissible sentence.]

20. [If a written guilty plea form is used,]

(a) Have you read the guilty plea form? _____

(b) Do you understand the guilty plea form? _____

(c) Are the statements in the guilty plea form true?_____

21. Have you entered into a plea agreement with the Commonwealth's attorney in this case? If the answer is in the affirmative, read or otherwise put the plea agreement into the record, then ask the following: Does it contain the full and complete agreement entered into among you, your lawyer, and the Commonwealth's attorney? Complete either (a) or (b), whichever is appropriate:

(a) [To be asked if the Commonwealth's attorney has agreed that a particular sentence is appropriate.] Do you understand that:

(1) The court may accept the agreement, reject the agreement, or may defer any decision to either accept or reject until there has been an opportunity to consider a presentence report? _____

(2) If the court accepts the agreement, the court will include in its judgment and sentence the sentence provided for in the agreement? _____

(3) If the court rejects the agreement, you will not be bound by the agreement and you will be given an

opportunity to withdraw your plea of guilty, and if you do, your trial may be conducted by another judge of this court?

_____

(4) If you still plead guilty after the court rejects the plea agreement, the sentence in the case may be more severe than the disposition contained in the plea agreement? _____

(b) [To be used if the Commonwealth's attorney merely recommends, or agrees not to oppose a request for, a specific sentence.] Do you understand that this agreement only provides for the Commonwealth's attorney (to make a recommendation) (to agree not to oppose a request for) a particular sentence, that this recommendation or request is not binding on the court, and if the court does not accept the recommendation or does not go along with the request, you have no right to withdraw your plea of guilty unless the Commonwealth fails to perform its part of the agreement? Do you also understand that the sentence the court imposes may be more severe than the sentence (recommended) (requested)? _____

22. [If the defendant was a juvenile at the time of the offense,] Do you understand that if you were tried for this offense and found guilty, the court and not the jury would set the sentence? _____

23. Do you understand all of these questions? _____

24. Do you have any questions you wish to ask the court?

_____

APPENDIX E

Transcript of proceedings, 3/24/00 (in Appellate Record)

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG.

COMMONWEALTH OF VIRGINIA **CASE NO(S): 10259**
v.
GEORGE THAYLER DIGGS, JR.

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the hearing in the case of COMMONWEALTH VERSUS GEORGE THAYLER DIGGS, JR., heard in the Circuit Court for the City of Williamsburg, at Williamsburg, Virginia, on March 24, 1999, before the Honorable J. Warren Stephens, Judge of said Court.

PRESENT: Nancy K. Bolash, Atty.for the Commonwealth
Edward James Bell, III, Atty. for the Defendant
ROSEMARY A. JACKSON
SCHNEIDER AND ASSOCIATES
107 TELFORD DRIVE
NEWPORT NEWS, VIRGINIA 23602

(Index omitted)

(The court reporter was duly sworn.)

(The defendant was present in the courtroom with his attorney)

THE COURT: What's the nature of this motion?

MR. BELL: Your Honor, I was appointed yesterday to represent Mr. Diggs. Judge Oast revoked his bond.

THE COURT: He's coming over here Friday, isn't he? Wouldn't it be appropriate to have this matter heard by him on Friday?

MR. BELL: It would, Your Honor, if that's available. I simply took the first time that we were able to coordinate our schedules.

THE COURT: Since it's Judge Oast's case I think it would be a whole lot better, Mr. Bell, if Judge Oast hears it on Friday. Let me see, I can tell you with certainty -- yeah, he's going to be here Friday. He's got about six or eight cases. You want to put yours on that?

MR. BELL: Morning, Your Honor?

THE COURT: He has 9 a.m. cases and a few -- and one 2 p.m. case. You want a morning case or afternoon case?

MR. BELL: Morning case would be agreeable to the best of my --

THE COURT: If you would put that number one on the docket.

MR. BELL: Thank you, Your Honor.

(The court took up other matters and after which the following occurred:)

(The defendant was present in the courtroom with his attorney.)

MS. BOLASH: The case, Your Honor, is Mr. Diggs' case, and he did not try the case. He just remanded Mr. Diggs to jail on no bond.

THE COURT: That's right. Mr. Diggs is the man who wanted a jury.

MR. BELL: That's correct, Your Honor. Mr. Diggs asks the Court to accept his guilty plea and there is a plea agreement.

MS. BOLASH: Because this is last minute, Your Honor, it is in writing but it's in handwriting and I hope that's all right for Your Honor.

THE COURT: No. Why can't we do this on Thursday or Friday?

MS. BOLASH: The problem is that Mr. Bell will not be here oin Friday. He misunderstood Your Honor and thought that you were going to be here today -- I mean tomorrow, excuse me, and Judge Oast would be here tomorrow.

MR. BELL: Otherwise we would present the plea to Judge Oast on Friday.

THE COURT: Well, the plea agreement should be typed, in my opinion. And you can't be here first thing on Friday Morning?

MR. BELL: Unfortunately, Your Honor, our family including our grandchildren are going to Florida on Friday and as the resident grandfather I'm expected to help with the strollers.

THE COURT: Yes, sir, I can appreciate that, being one myself.

MR. BELL: If we could get the plea agreement typed this afternoon would the court be willing to entertain it?

THE COURT: I suppose so, yes, sir. I think it should be typed particularly in view of the fact that your client was a latecomer with the jury demand the other day and I just think it ought to be typed.

(The Court took up other matters and after which the following occurred:)

(The defendant was present in the courtroom with his attorney.)

THE COURT: All right. This is the case of Rhonda J. Canaday, is that correct?

MS. BOLASH: No, sir, this is George Thayler Diggs.

THE COURT: And Mr. Diggs is charged with maliciously shooting at an occupied vehicle, a reckless handling of a firearm, and threatening to do bodily harm, is that correct?

MS. BOLASH: Yes, sir.

THE COURT: What kind -- you say you have a plea agreement. What kind of an agreement do you have?

MS. BOLASH: We would move to nol-pros the felony, Your Honor, and we would move to amend the charge of reckless handling of a firearm to trespass with an intent to interfere. There'd be a plea of guilty to that trespass charge as well as the assault charge.

THE COURT: All right. Are you moving that now?

MS. BOLASH: Yes, sir, I am.

THE COURT: All right. Sir, do you understand what a nol-pros is? It's not a finding of not guilty.
THE DEFENDANT: Yes, sir.
THE COURT: A nol-pros is not a dismissal of the indictment. You understand that?
THE DEFENDANT: I believe it is a decision not to prosecute.
THE COURT: Yes, sir, it's a decision not to prosecute, but it does not mean that you be found not guilty.
THE DEFENDANT: (The defendant nods his head.)
THE COURT: Nor does it mean that the indictment has been dismissed. It merely means that the Commonwealth has asked the court to nol-pros the indictment saying that it does not want to proceed on the present paperwork. Do you understand that?
THE DEFENDANT: Yes, sir.
THE COURT: And do you understand that the indictment may be re-presented, that is starting all over again? I'm talking about the indictment numbered 10259 charging that on or about May 27, 1998 in James City County you did maliciously shoot a motor vehicle while occupied by one or more persons whereby the life or lives of such persons were put in peril, that's what the Court is talking about, that indictment.
THE DEFENDANT: Yes, sir.
THE COURT: Do you object to the non-pros or not?
THE DEFENDANT: No, sir, I have no objection.
THE COURT: Okay. All right then, the indictment is nol-prossed. And you have two misdemeanors?
MS BOLASH: Yes, sir, the reckless handling of a firearm is being amended from one misdemeanor to another, it's being amended to trespass under 121.
THE COURT: I've got maliciously shooting at or throwing -- which one of these --
MS. BOLASH: The felony.

THE COURT: This is my first experience with this file. I have no idea what's going on. Reckless handling of a firearm so as to endanger life, limb, or property?
MS. BOLASH: Yes. We are moving to amend that to trespass under 18.2-121. The assault charge remains the same.
THE COURT: Is there any objection to the amendment of reckless handling of a firearm to trespassing under 18.2-121?
MR. BELL: No, Your Honor.
THE COURT: And the threats to do bodily harm, the third warrant -- I got two -- I got more than one reckless handling of a firearm.
MS BOLASH: One -- there was a not guilty on one of the charges, that was the 18.2-280; then there should be a 18.2-257, and that remains the same.
THE COURT: I've got two reckless handling of a firearm; maybe one's a copy of the other, is that what it is? This is just a copy. Then the next one is threats to do bodily harm to John E. Burk. What is the assault and battery that you're talking about?
MS. BOLASH: That is 18.2-257.
THE COURT: Threats to do bodily harm?
MS. BOLASH: Yes. For whatever reason they listed it as threats, but it should be assault of John Burk. The code section is correct, the wording is inexact.
THE COURT: All right. The Court has non-prossed the felony. Now, sir, you are charged with -- you said you have a written plea agreement?
MS. BOLASH: Yes, sir.
THE COURT: All right. We now have two charges left and they are -- and you are Mr. George Thayler Diggs --
THE DEFENDANT: Yes, sir.
THE COURT: -- Junior?
THE DEFENDANT: Yes, sir.
THE COURT: You are charged with an assault upon John E. Burk on or about May 27, 1998. Is this in James City County or Williamsburg?

MS. BOLAS: James City County.
THE COURT: You are charged with an assault upon John E. Burk in James City County on or about May 27, 1998 in violation of Virginia Code Section 18.2-57. How do you plead?
THE DEFENDANT: An Alford Plea of guilty, Your Honor.
THE COURT: You are charged with trespass under code section 18.2-121 on or about May 27, 1998 in James City County, Virginia. How do you plead?
THE DEFENDANT: Alford plea of guilty, Your Honor.
THE COURT: Your name is George Thayler Diggs, Jr.?
THE DEFENDANT: Yes, sir.
THE COURT: And how old are you, sir?
THE DEFENDANT: Fifty-seven.
THE COURT: What is the date of your birth?
THE DEFENDANT: 11-26-41.
THE COURT: What is the highest grade you completed in school?
THE DEFENDANT: Sixteen
THE COURT: You don't have any difficulty reading, writing, or understanding the English language?
THE DEFENDANT: No, sir.
THE COURT: Are you the same person charged under these two warrants, one of with trespassing and the other with assault on John E. Burk.
THE DEFENDANT: Yes, sir.
THE COURT: Do you fully understand that in order to convict you of those crimes it's necessary that the commonwealth prove beyond a reasonable doubt the elements of intent?
THE DEFENDANT: Yes, sir.
THE COURT: Do you fully understand the charges against you?
THE DEFENDANT: Yes, sir.
THE COURT: Have you discussed the charges with Mr. Bell?
THE DEFENDANT: Yes, sir.

THE COURT: After discussing it with Mr. Bell do you now know what the attorney for the commonwealth is required to prove beyond a reasonable doubt in order to convict you of those two misdemeanors?
THE DEFENDANT: Yes, sir, I do.
THE COURT: Voluntary and intelligent pleas of guilty are more than confessions, they are themselves self-supplied convictions of crimes charged. Nothing remains for the Court to give judgment on the convictions and determine punishment as fixed by law. Therefore if the Court accepts the pleas of guilty, voluntarily and intelligently made by you to the crimes charged against you, do you understand that there will be no further trial of any kind as to your innocence or your guilt?
THE DEFENDANT: Yes, sir.
THE COURT: Should the Court accept pleas of guilty made by you to the two misdemeanors charged against you do you understand that if the Court intends to question you under oath on the record and in the presence of your counsel about those crimes your answers to the Court's questions may be used against you in the prosecution for perjury or false statement?
THE DEFENDANT: Yes, sir.
THE COURT: Do you understand, sir, you have a right to plead not guilty or enter pleas of no plea on which pleas of not guilty will be entered for you by the Court?
THE DEFENDANT: Yes, sir.
THE COURT: Do you understand that these are criminal misdemeanor cases against you and that you are the defendant?
THE DEFENDANT: Yes, sir.
THE COURT: Should you plead not guilty to the two misdemeanors or decline to plea and the Court entered not guilty pleas, then should you request a jury, do you understand that at the time of the trial by jury on those pleas, the jury would consist of seven persons, all members of the community who would be required to bring in a unanimous

jury verdict; that is, all; jurors voting the same way, not only with respect to your innocence or your guilt but if you're found guilty also with respect to your punishment?
THE DEFENDANT: Yes, sir.
THE COURT: Do you understand when you plead guilty you give up the benefit of the presumption of innocence?
THE DEFENDANT: Yes, sir.
THE COURT: When you plead guilty you give up your right to require the Commonwealth to prove your guilt beyond a reasonable doubt prior to any finding of guilt.
THE DEFENDANT: Yes, sir.
THE COURT: When you plead guilty you give up your right not to testify during the trial of the case.
THE DEFENDANT: Yes, sir.
THE COURT: When you plead guilty you give up your right to a trial by jury; if you're found guilty you're (sic) right to be sentenced by a jury.
THE DEFENDANT: Yes, sir.
THE COURT: When you plead guilty you give up your right to confront and cross-examine your accusers and other witnesses against you.
THE DEFENDANT: Yes, sir.
THE COURT: When you plead guilty you give up your right to object to the introduction into evidence of any illegally obtained evidence.
THE DEFENDANT: Yes, sir.
THE COURT: When you plead guilty you give up your right to defend yourself.
THE DEFENDANT: Yes, sir.
THE COURT: When you plead guilty you may be convicted on your guilty pleas alone.
THE DEFENDANT: Yes, sir.
THE COURT: You understand that?
THE DEFENDANT: Yes, sir, I do.
THE COURT: Are you on probation or parole?
THE DEFENDANT: Neither.
THE COURT: Are you under suspended sentence?

THE DEFENDANT: No, sir.
THE COURT: Are you on parole?
THE DEFENDANT: No, sir.
THE COURT: By pleading guilty you also waive or give up all but jurisdictional defense, do you understand that?
THE DEFENDANT: Yes.
THE COURT: So understanding your rights on pleas of not guilty, do you desire to plead guilty or not guilty to the two misdemeanors?
THE DEFENDANT: Guilty.
THE COURT: Are you entering the pleas of guilty of your own free will?
THE DEFENDANT: Yes, sir.
THE COURT: All right. Would the Commonwealth's Attorney summerize (sic) the evidence.
MS. BOLASH: Yes, Your Honor. This was a case in James City County that occurred on May 27th, 1998. It involved a Ms. Herndon and a John Burk who came to the home of Mr. Diggs to pick up a vehicle that was the subject of a pick-up order. There was a disagreement as to the right of these individuals to pick up that vehicle and subsequently things deteriorated.

Mr. Diggs went into his home and procured a gun and shot in the direction of Ms. Herndon and -- Mr. Burk and Ms. Herndon. The vehicle was damaged. And subsequently Ms. Herndon had an asthma attack and had to be hospitalized, hence the restitution that is owed to her under the plea agreement as well as to Mr. Burk.
THE COURT: Thank you, ma'am. Would you please stand. You have heard the evidence summarized by the Commonwealth. Are you pleading guilty because you've heard that evidence summarized and you believe upon presentation of the evidence the Commonwealth can prove your guilt beyond a reasonable doubt and you do not wish to take that risk, is that correct?
THE DEFENDANT: Yes, sir.

THE COURT: Has anyone connected with your arrest or prosecution, such as the police or the attorney for the Commonwealth or any other person, in any manner, threatened you, coerced you, forced you, pressured you, or tricked you to enter either of these pleas of guilt?
THE DEFENDANT: No, sir.
THE COURT: The attorney for the Commonwealth when (sic) signed the plea agreement has agreed to the disposition set forth in the plea agreement if you plead guilty. Except with respect to that agreement by the attorney for the Commonwealth to the disposition of your two misdemeanor cases, has anyone made you any promise of leniency or any other promise to plead guilty?
THE DEFENDANT: No, sir.
THE COURT: Do you understand that both of these misdemeanors are Class One Misdemeanors and the range of punishment is up to twelve months in jail or up to $2500 for each one of them?
THE DEFENDANT: Yes, sir.
THE COURT: The attorney for the Commonwealth has presented in court a memorandum of plea agreement dated March 24, 1999. Is that your signature?
THE DEFENDANT: Yes, sir.
THE COURT: Have you discussed the agreement with your lawyer?
THE DEFENDANT: Yes, sir.
THE COURT: Is there anything in the agreement you don't understand?
THE DEFENDANT: No, sir.
THE COURT: Do you -- did you voluntarily sign the agreement?
THE DEFENDANT: Yes, sir, I did.
THE COURT: Are you agreeing to plead guilty to the crimes set forth in the plea agreement because you have heard the evidence summarized and under the Alford plea you do not believe you could successfully defend it?
THE DEFENDANT: Yes, sir.

THE COURT: Are you agreeing to the dispositions set forth in the agreement; that is, on the 25901 which is the trespass, that you will have six months in jail suspended for two years; you will be on probation with Colonial Community Corrections until released by the probation officer; you will agree to pay restitution in the amount of $460 to Martha Herndon and $740 to John Burk payable through Colonial Community Corrections; you are to keep the peace and be of uniform good behavior and not violate any laws of the Commonwealth or any other political subdivision for a period of two years commencing today?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that the deal is with respect to the assault and battery -- or the assault, is you will get twelve months in jail, twelve months suspended, conditioned upon probation with Community Correction until released by the probation officer; you pay the same restitution in the amount of 460 to Martha Herndon and 740 to John Burk payable through Colonial Community Correction -- that's only one payment, not two. We're not doubling up. You are to keep the peace and be of uniform good behavior for a period of two years commencing today. Is that the deal?

THE DEFENDANT: Yes, sir.

THE COURT: You understand the Court has the right to hear and consider testimony and other evidence, which the court has already done. You understand that the Court is not bound by the plea agreement. Do you understand that if the Court accepts the plea agreement, the Court will inform you of that fact and will embody in the Court's judgment and sentence what is provided for in the plea agreement?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand if the Court rejects the plea agreement the Court will advise you personally in open court, or upon a showing of good cause, in camera, meaning in chambers, that it will not accept the plea agreement, and

should that happen neither you nor the Commonwealth of Virginia will be bound by the rejected plea agreement?
THE DEFENDANT: Yes, sir.
THE COURT: You understand if the Court rejects the plea agreement that in imposing punishment on any subsequent trial of the two warrants the Court is not bound by any agreement which may exist between you and your counsel and the attorney for the Commonwealth and need not follow any recommendation made by the attorney for the Commonwealth?
THE DEFENDANT: Yes, sir.
THE COURT: Do you understand that if the Court rejects the plea agreement the Court will give you an opportunity to withdraw your plea of guilty. And if you do so your cases will be tried by another circuit court judge unless you give up that right?
THE DEFENDANT: Yes, sir.
THE COURT: You understand that if having rejected your plea agreement the Court having given you the right to withdraw your plea of guilty and you refuse to do so, the Court will, then be obliged to advise you that if you continue to plead guilty after the Court rejects the plea agreement the sentences in the case may be more severe than those set forth in the rejected plea agreement?
THE DEFENDANT: Yes, sir.
THE COURT: Have you had plenty of time to consult with your lawyer and discuss with him any possible defenses you have to these two misdemeanors?
THE DEFENDANT: Yes sir, I have.
THE COURT: Do you need any additional time to talk to him about it?
THE DEFENDANT: No, sir.
THE COURT: Have you discussed with him whether you should plead not guilty or whether you should plead guilty or whether you should refuse to plead, in which case the Court would enter a not guilty plea for you?
THE DEFENDANT: Yes, sir.

THE COURT: After that particular discussion with your lawyer did you decide for yourself that you would plead guilty?
THE DEFENDANT: Yes, sir.
THE COURT: Did you decide for yourself that you would sign the plea agreement?
THE DEFENDANT: Yes, sir.
THE COURT: Do you understand that when you plead guilty you waive any right to appeal or petition for any appeal from the decisions of this Court with the exception of the existence in these proceedings of any jurisdictional defects?
THE DEFENDANT: Yes, sir.
THE COURT: Do you understand that in this Court's opinion there are no jurisdictional defects in the proceeding?
THE DEFENDANT: I'm sorry?
THE COURT: Do you understand that there are no jurisdictional defects in the proceedings?
THE DEFENDANT: Yes, sir.
THE COURT: You understand then for all practical purposes when you voluntarily and intelligently and freely plead guilty, you waive any right to appeal or petition for appeal?
THE DEFENDANT: Yes, sir.
THE COURT: Do you know of any reason why you should not be tried today?
THE DEFENDANT: No, sir.
THE COURT: You've been fully advised of the nature of the charges, the consequences of your pleas of guilty to these two misdemeanors, and your rights. Is it your decision to plead guilty or not guilty to the two misdemeanors charged against you in the two amended warrants, guilty or not guilty?
THE DEFENDANT: Guilty, Your Honor.
THE COURT: Are you now ready for trial?
THE DEFENDANT: Yes, sir.

THE COURT: Are you entirely satisfied with Mr. Bell's services?
THE DEFENDANT: Yes, sir.
THE COURT: Do you understand all the questions the Court has asked you?
THE DEFENDANT: Yes, sir.
THE COURT: Do you have any questions to ask the Court?
THE DEFENDANT: No, sir.
THE COURT: Sir, the Court finds that you have freely, voluntarily, and intelligently pled guilty with an understanding of the nature of the charges, the consequences of the pleas to the two crimes charged against you in the amended warrants, and do you agree that both of these cases be tried at the same time?
THE DEFENDANT: Yes, sir.
THE COURT: All right. Sir, the Court accepts your pleas of guilty at this time, direct that you be tried at one time on both warrants. The Court heard the evidence summarized. Any further evidence in this case?
MS. BOLASH: No, Your Honor.
THE COURT: Commonwealth rests. Defendant rests?
MR. BELL: Correct, Your Honor.
THE COURT: Sir, you have been fully examined by the Court concerning the terms of the memorandum of plea agreement signed by you, by your lawyer, Mr. Bell, and by the attorney for the Commonwealth. Do you request that the Court accept or reject the agreement?
THE DEFENDANT: Accept it, Your Honor.
THE COURT: Sir, the Court does accept the plea agreement and will embody in the Court's judgment and sentence what is provided for in the plea agreement. You're not entitled to a PSR, and that is a presentence report. You don't want one anyhow, do you?
MR BELL: No, sir.
THE COURT: All right, sir, as provided in the plea agreement the Court finds you guilty of trespassing under

criminal warrant numbered 10251.09 as amended, a violation of the Virginia Code section 18.2-121, a misdemeanor.

Proceeding further, sir, in accordance with the plea agreement, the Court finds you guilty of assault as charged against you in criminal paper 10259-02 and being a violation of Virginia Code Section 18.2-57, both of these instances occurred in James City County on or about May 27, 1998.

Before the Court determines your punishment with respect to the trespass conviction in accordance with the plea agreement, do you desire to make a statement? You are not required to make a statement. This is your opportunity to make a statement if you desire to do so.

THE DEFENDANT: No, sir.

THE COURT: Do you desire to give the Court any reason why you should not be sentenced in accordance with the plea agreement on the trespass conviction?

THE DEFENDANT: No, sir.

THE COURT: There being no reason for delay, the Court sentences you to confinement in jail for a period of six months, suspended, conditioned upon active probation with Colonial Community Correction until released by the probation officer, and conditioned upon making restitution in the amount of $460 to Martha Herndon and $740 to John Burk payable through the Colonial Community Correection Department, and conditioned upon your being of uniform good behavior for a period of two years commencing today, that is during the twoi year period that you not violate any law of the United States of America, or the Commonwealth of Virginia, any political subdivision or any state or Commonwealth.

Before the Court determines your punishment in accordance with the terms of the plea agreement with respect to your having been convicted of the assault, do you desire to make a statement?

THE DEFENDANT: No, sir.

THE COURT: You're not required to make a statement.

THE DEFENDANT: No, sir.

THE COURT: Do you desire to give the Court any reason why the Court should not now determine your punishment?
THE DEFENDANT: No, sir.
THE COURT: There being no reason for delay, in accordance with the terms of the plea agreement, the Court sentences you to confinement on the assault conviction to twelve months in jail, suspended, conditioned upon probation with Colonial Community Correction until released by the probation officer, conditioned upon your making restitution in the amounts of $460 to Martha Herndon and $740 to John Burk as required of you under the terms of the trespass conviction payable through Colonial Community Correction, and conditioned upon your being of uniform good behavior, that is not violate any laws of the United States of America or the Commonwealth of Virginia, or any other state or Commonwealth, any political subdivision of any state or Commonwealth at any time during the two year period commencing today.

Sir, you have a right to petition for an appeal with the Virginia Court of Appeals. If you desire to do so you should consult with your attorney without delay. The first step in any such appeal procedure is the filing by you of a notice of appeal with the clerk of this court within thirty days.

Have the record reflect that the defendant and his counsel have both been personally present at every stage of these proceedings and Mr. Bell has capably and ably represented the defendant. Any questions?
THE DEFENDANT: No, sir.
THE COURT: All right, sir. You have to be fingerprinted.
MS. BOLASH: Thank you, Your Honor.
(The proceedings were concluded)
(Certificates of Court Reporter, Counsel and Court Omitted)

APPENDIX F

The Virginia Gazette, Williamsburg VA, 3/24/99, Page 2A

Businessman jailed over trial delays

By Paul Aron

WILLIAMSBURG - A local businessman was thrown in jail Tuesday morning after a judge apparently decided that his request for a jury trial was part of a pattern of delay.

George "Duke" Diggs, the founder of Duke Communications, is charged with shooting into an occupied vehicle. The charges stem from a May 1998 incident when a repo man attempted to take Diggs' car from his Lake Powell Drive home.

According to police, Diggs fired a 9mm semiautomatic pistol at the repo man's truck. Diggs doesn't deny firing the shots, but he says there was no danger to the driver or his girlfriend, who was also in the truck. Diggs claims he's an expert marksman, and his intent was to hit the tires so the tow truck couldn't take his car.

Retired Judge William Oast was clearly annoyed by Diggs' surprise request for a jury trial. Diggs has a right to a jury trial, but Oast revoked his bond and told the defendant he would remain in jail until the trial.

Questioned afterward about whether his ruling would discourage others from invoking their constitutional right to a trial by jury, Oast referred a reporter to the case file. That included a series of delays, as Diggs changed from one attorney to another.

Diggs' third attorney, Jim Benkhala, asked the judge to replace him Tuesday. Benkhala said he couldn't state publicly any specific reasons, but he mentioned his client's "lack of cooperation." Oast agreed to appoint another attorney.

A York prosecutor, Nancy Bolash, is handling the case, since Duke Communications has provided some services for the Williamsburg-James City commonwealth attorney's office. Bolash said that she didn't think the request for a jury trial had itself provoked Oast. "I think he fully reviewed the entire record, and his decision was based on that," she said.